Supreme Court of the United States

OCTOBER TERM, 1944

No. 799

SAFEWAY STORES, INCORPORATED, *Petitioner,*

v.

CHESTER BOWLES, Price Administrator.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

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December 29, 1944.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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Petition for a Writ of Certiorari to the United States Emergency Court of Appeals and Brief in Support Thereof

PETITION

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Safeway Stores, Incorporated, respectfully submits to this Honorable Court the following:

A

STATEMENT OF MATTER INVOLVED

This case is based upon a protest filed by petitioner against a maximum price regulation issued by the Price Administrator whereby the petitioner and other chain store

organizations, and also certain large independent stores, were ultimately subjected to a 4% rollback from the retail ceiling price established for each grade of beef, veal, lamb and mutton cuts if the meat department of the individual store had a total gross margin of 19% or less on its sales during the year 1941. The regulation was issued in purported pursuance of Section 2 of the Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. Appx. § 901.

Petitioner is a Maryland corporation with its principal office in Oakland, California. It owns and operates more than 2,300 retail food stores in 23 states of the United States and in the District of Columbia as a single corporate entity. All of these stores sell numerous commodities, including meats, at retail. The majority of the stores had a total sales volume for the year 1942 of less than $250,000 per store, but the combined total of all stores for that year was more than $40,000,000. The petitioner has an historic publicly-advertised and consumer-accepted policy of maintaining the same prices on the same commodities in all of its stores in the same trading area, irrespective of the total sales volume of each store.

Maximum Price Regulation 355, as amended by the Price Administrator on March 14, 1943 (Amendment No. 3,[1] 8

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[1] In the statement of the considerations involved in the issuance of Amendment No. 3 to MPR 355 the following paragraph appears (Record, p. 64):

> "Further surveys made by the Administrator reveal that prevailing prices established by the General Maximum Price Regulation for these large-volume stores are lower than the level of prices fixed for Class 3 and 4 stores. Consideration is being given to the setting up of a fifth class of retail stores. The past operations of these retail outlets were on a low-margin basis, and the reduction required will not restrict those margins. The volume of business done by the stores affected comprises a substantial part of the total volume of retail-food business. Hence, the omission to take account of them separately would materially affect the cost of living."

F. R. 6428), required petitioner's retail stores that had a total 1942 individual sales volume of $250,000 or more to sell at retail each grade of beef, veal, lamb, and mutton cuts at a ceiling price 10% lower than the maximum established for other stores similarly classified (placed in so-called Group 3 and 4) but which were not a part of a chain store group which had a combined 1942 sales volume of $40,000,000 or more. In other words, the rollback was imposed only upon the very large chain store organizations, including petitioner.

Prior to the issuance of MPR 355 there were four store classifications based on 1942 sales volume: Group 1 included independent stores with a sales volume of less than $50,000; Group 2 included independent stores with a sales volume of $50,000 or more but less than $250,000; Group 3 included chain stores (those comprising a group of four or more under common ownership whose combined 1942 sales totaled $500,000 or more) having a volume of less than $250,000; and Group 4 included all chain and independent stores with a sales volume of $250,000 or more. (R. 33-4.)

By combining the groups, Section 2(c) of MPR 355 reduced the existing classifications to two in number: "Group 1 and 2" included independent stores which had a 1942 total sales volume of less than $250,000 and "Group 3 and 4" included all other stores. Then came Amendment 3 which, for the purpose of imposing the 10% rollback, added a new classification, one consisting of stores which had a total individual sales volume in 1942 of $250,000 or more, as did the minority of petitioner's stores, and which were members of a chain store organization which had a combined total 1942 sales volume of $40,000,000 or more, as did petitioner.

Therefore, although the 10% rollback were applicable only to a minority of its stores, because a majority had individual 1942 sales of less than $250,000, the petitioner, in order to continue its historic one-price policy in a trading area, was obliged to apply the rollback to all of its stores in that area.

On August 13, 1943, in the Office of Price Administration, there was held a meeting of representative members of the retail meat dealers, both chain and independent, in connection with MPR 355. The meeting *unanimously* approved a resolution presented by the Director of the National Retail Meat Dealers Association recommending that the classification of stores based upon volume of sales and/or type of ownership be abandoned, and that but a single ceiling price be established for each grade of regulated meat at the retail level so that the consuming public might be protected in times of scarcity while permitting the forces of competition to act for the public benefit in times of plentiful supply.[2] (R. 36, 76, 81.)

On September 2, 1943, the Administrator issued Amendment No. 10 to MPR 355 whereby he changed to 4% the 10% reduction previously provided and, instead of restricting the rollback to chain stores having a total sales volume of $40,000,000 or more, he extended its application to all Group 3 and 4 stores (including independent stores with a total sales volume of $250,000 or more) but limited it to those which in 1941 had a total gross margin of 19% or less on meat department sales.[3] Thus, while the rollback classi-

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[2] A similar recommendation was made by representatives of the wholesale and retail food industry in June, 1943. See footnote 5, p. 14, post.

[3] Amendment No. 10, 8 F. R. 12237, provides, in part:

". . . If any group 3 and 4 store had during 1941 a total gross margin of 19% or less on its meat department sales of all items including beef, veal, lamb, mutton, pork, poultry, sausage, variety meats and edible by-products, then the ceiling prices

fication was enlarged, in that it embraced all chain stores regardless of individual or combined sales volume and also all independents with sales of $250,000 or more, its application was restricted to those stores with a 19% or less meat sales margin. Therefore, even though only a small number, or just one, of petitioner's stores in a given trading area had such a meat department sales margin, the petitioner, if it is to follow its historic one-price policy, must treat all of its stores in that area as having a 19% or less meat sales margin and reduce their prices 4% below the established ceilings.

On January 11, 1944, the petitioner, pursuant to a show-cause order issued by the Administrator, filed a "Further Statement" (R. 29-38) in support of its protest, wherein it insisted that the relief sought had not been granted by the issuance of Amendment No. 10 and requested (R. 38) the abolishment of the discriminatory classification of stores and the establishment of a single ceiling price on each of the regulated grades of meat.

On May 24, 1944, the Administrator denied the protest (R. 39), and on June 23, 1944, a complaint (R. 70-78) was

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applicable to such store for each grade of beef, veal, lamb and mutton cuts shall be 4% lower, adjusted to the nearest cent, than the ceiling prices established herein for group 3 and 4 stores in the appropriate zone. . . ."

In the statement of considerations involved in the issuance of the amendment the following appears (R. 66):

"The Administrator has consulted with representative members of the industry, has reviewed the original data and has obtained some new data on margins. From these sources he finds that the original reduction was too great on the stores subject to Amendment 3 while it omitted to include many stores which were not a part of the large organizations but operated on as low margins. . . . Because the records of retail stores are not ordinarily kept on the basis of gross margins on individual meats, it has been deemed advisable to provide for the new classification to which the 4 per cent differential applies on the basis of realized gross margins on the meat department as a whole. . . ."

filed in the United States Emergency Court of Appeals pursuant to Section 204(a) of the Emergency Price Control Act, 50 U. S. C. Appx. §924(a), 56 Stat. 31. That court entered a judgment of dismissal on November 29, 1944. (R. 88.)

B

JURISDICTION

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act, 50 U. S. C. Appx. §924(d), 56 Stat. 31. The complaint herein was dismissed by the Emergency Court on November 29, 1944. (R. 88.)

C

QUESTIONS PRESENTED

The primary questions presented are—

(1) Whether the Administrator acted arbitrarily or capriciously in not establishing a single-price ceiling for meats at the retail level.

(2) Whether the Administrator may, arbitrarily and without substantial basis, impose a 4% rollback from the established meat ceiling prices for Groups 3 and 4 stores which had a 1941 meat department sales margin of 19% or less, or whether such action is unconstitutionally discriminatory.

(3) Whether the interpretation placed by the Emergency Court upon the review provisions of the Act render them ineffective and offend against the due process clause of the Fifth Amendment.

D

REASONS FOR THE ALLOWANCE OF THE WRIT

1. *The Emergency Court of Appeals has decided a substantial question of federal law of general importance which has not been, but should be, settled by this Court.* Section 2 (a) of the Emergency Price Control Act provides for the establishment of maximum prices which will be "generally fair and equitable". The decision of the Emergency Court herein is to the effect that a rollback from established ceiling prices may be discriminatively applied and at the same time be "fair and equitable". The Court refuses to recognize any discrimination in the application of the rollback but considers its only duty to be to determine whether the over-all price structure has been shown not to be generally fair and equitable. Discrimination is condoned if it does not result in an actual operating loss to the person who is adversely affected.[4] Such an interpretation of the Act circumvents the intent thereof to prevent inflation without resort to arbitrary tactics, such tactics being grounds for declaring a regulation invalid under the review provisions of the Act. If such an interpretation were warranted, the Act would be invalid as unconstitutionally discriminatory.

2. *The Emergency Court has interpreted the Price Control Act in such a way as to defeat the due process of law guaranteed by the Fifth Amendment to the Constitution*

[4] The question of whether the Price Control Act authorizes injuriously discriminatory and arbitrary action by the Administrator in the purported furtherance of a "generally fair and equitable" over-all price structure is also discussed in another petition (Docket No. 798) filed by Safeway Stores, Incorporated, in this Court today. The Emergency Court, in its decision herein, refers (R. 85, 87) to its decision in the other case.

and provided by Congress. Section 204 of the Act contains provisions for the review of actions of the Administrator denying protests against price regulations. The Emergency Court is empowered to set aside any regulation which is found to be "arbitrary or capricious". However, by interpreting the Act to *authorize* arbitrary methods unless they are shown to be unfair and inequitable to a *major* portion of an industry, the court has rendered ineffective the review provisions and made a mockery of the due process provided by the Act and guaranteed by the Fifth Amendment.

3. *The Emergency Court has not given proper effect to an applicable decision of this Court.* It has accepted the Administrator's discriminatory and arbitrary findings at face value in accordance with its own narrow interpretation of the requirements of the Price Control Act and of due process, without regard for the lack of any "substantial basis" for those findings as stated by this Court to be a necessary part of the Administrator's statement of the considerations involved in the issuance of any regulation.

Wherefore, the petitioner prays that a writ of certiorari be issued to review the judgment of the United States Emergency Court of Appeals in the above entitled cause, that said judgment be reversed, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

Respectfully submitted,

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December 29, 1944.